Filed 5/10/10 In re S.H. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re S. H., a Person Coming Under the Juvenile Court Law.	H034376 (Santa Cruz County Super.Ct.No. DP000197)
SANTA CRUZ COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. M. H., Defendant and Appellant.	

M. H., the grandmother of S. H. and his designated de facto parent under the juvenile dependency law, appeals from the juvenile court's determination that her supervised visits with him are to be reduced from twice weekly to once a month. The grandmother argues that due process principles, including fundamental fairness, entitled her to be represented by counsel and to appear on her own behalf at the hearing at which the court decided to reduce her visits with her grandson–de facto son. She argues that some of the unfairness stems from counsel's asserted failure to press her interests in various ways, including failing to tell the juvenile court that it had appointed counsel for her as a de facto parent and may have forgotten that fact when it later relieved counsel.

We conclude that the grandmother's claims are unavailing and will affirm the order.

FACTS AND PROCEDURAL BACKGROUND

S. H. will turn 13 on June 2010. He comes from a difficult background and has had continual behavior problems in school.

S. H. has been the subject of at least two sets of juvenile dependency proceedings. A prior set was resolved by appointing the grandmother to be S. H.'s guardian (see Welf. & Inst. Code, § 366.26, subd. (b)(2))[1] after the mother's parental rights were ended.

Partly because S. H.'s grandmother was unable to protect him from abuses committed by his mother, however, and partly because S. H. was violent toward his grandmother, inflicting physical harm on her, the foregoing resolution proved to be unworkable. In addition and as mentioned, S. H. has been ill-behaved in school.

On June 3, 2008, the Santa Cruz Human Services Department (department) filed a modification petition (§ 388) requesting that the juvenile court reinstate jurisdiction to provide services to M. H. and S. H. The department submitted a long report detailing the family's problems. On June 17, 2008, the Santa Cruz Juvenile Court appointed counsel for the grandmother, who remained S. H.'s guardian. The court granted the modification petition and reinstated jurisdiction, i.e., resumed S. H.'s status as a dependent of the court. S. H. continued to be in his grandmother's care, the guardianship remained in effect, and the department was directed to prepare a case plan for the two.

The department attempted to provide permanency placement services to S. H. and M. H., but S. H. continued to attack his grandmother and misbehave in school. The grandmother requested that the guardianship be ended. The department filed a

[1] Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

supplemental (§ 387) petition to remove S. H. from the grandmother's home. The juvenile court agreed and detained S. H. on November 12, 2008.

It appears that S. H. was placed in foster care. At a November 25, 2008 hearing prior to adjudication of the supplemental petition, the juvenile court ordered that visitation between the grandmother and minor be set at a minimum of two visits per week, supervised, with social worker discretion to increase or decrease the level of visitation as long as such changes were made above the twice-weekly floor.

On December 19, 2008, counsel for the grandmother told the juvenile court that the grandmother continued to want her guardianship to be ended. The court agreed, dissolved the guardianship, and granted the grandmother de facto parent status. The order provided that "[a]ll prior orders remain in effect," which by implication included the twice-weekly supervised-visit schedule. A related order, filed on December 22, 2008, stated not only that "[t]he request for de facto parent status is granted" but also that "[t]he court does . . . appoint a lawyer to represent the de facto parent." The court appointed Kevin Thurber.

A permanent plan hearing (§ 366.26) was set for April 7, 2009, and the grandmother and her counsel—not Thurber, however, but Regina Jett, who said she was "appearing specially"—were present. The department asked for visitation between S. H. and his grandmother to be reduced to once a month but the juvenile court postponed resolving that question until the next hearing, which it set for April 21, 2009. The court ordered counsel to be relieved because the grandmother now was not a guardian but a de facto parent who was not automatically entitled to state-provided counsel. Jett did not object to the court's action in removing the grandmother's court-appointed counsel. Despite the December 22, 2008 written order appointing Thurber as the grandmother's counsel, the court commented, "she hasn't had counsel appointed for her." Jett did not disagree, but posed the possibility that "the court would benefit from having some input from her." The court replied that it did not know how S. H. felt about the matter. The

grandmother was present in the courtroom during this exchange. The court told the grandmother that the next hearing would be April 21, 2009, and the grandmother stated that she understood and said, "I will have a voice in it, also." The court did not disagree.

The grandmother did not appear at the April 21, 2009 hearing, nor did counsel appear on her behalf. The record does not show that she was prevented from attending that hearing by state action. It also shows, however, the possibility that she was not entirely at fault for failing to attend it. She later asserted in court papers that she lost a piece of paper on which she had written down the time of the next hearing; three phone calls to her now former counsel asking about the hearing date went unreturned; and the department erroneously failed to mail her a report that she implicitly asserts would have given the time of the next hearing.

At the April 21, 2009 hearing a social worker restated the department's desire that visits between S. H. and his grandmother be set at one per month. The juvenile court found that the current visitation schedule was harming S. H. and ordered the schedule modified as requested. "I think the two of them have somewhat of a codependency that is very unhealthy and there is a power struggle also within that as well," the court commented.

On May 18, 2009, the grandmother, acting in propria persona and noting that she no longer had counsel to represent her, filed a modification petition (§ 388) seeking weekly visits. She recited the difficulties she had in getting and retaining information regarding the precise time of the April 21, 2009 hearing and complained that S. H.'s last expressed desire was to meet with her weekly, not monthly. A social worker had reported, however, that the grandmother could not behave herself and follow the rules during supervised visits, and the juvenile court denied the petition on May 20, 2009, as inimical to S. H.'s best interests. The court ordered that "[v]isitation will remain the same[;] however[, the] maternal grandmother may send cards & notes to [S. H.] via the

social worker. Visitation will be re-examined at the [next section 366.26] hearing[,] which is only one week away."

At that selection and implementation hearing, held on May 28, 2009, the grandmother was present. Also present was S. H.'s biological father, an Oregon resident whom the authorities had been unable to contact previously. A social worker told the juvenile court that S. H. and his father had had a "wonderful" first visit on the day before the hearing and that the department hoped to place S. H. with him in Oregon. S. H. was asking, " 'When can I go with my dad[?]' " to Oregon and his father was seeking to have his son placed with him as soon as he could make school, therapy, and housing arrangements. Counsel and the court entered into preliminary discussions about the possibility of ending the dependency proceedings and placing S. H. with his father. The court maintained the grandmother's visits at a floor of one supervised visit per month.

DISCUSSION

As noted, the grandmother claims that the juvenile court violated her due process rights and caused fundamental unfairness to occur by reducing the frequency of her visits with S. H. in her absence and in the absence of counsel at the hearing held on April 21, 2009.

I. *Overview of De Facto Parents' Role in Juvenile Dependency Cases*

The grandmother's status as a de facto parent falls outside the juvenile dependency law set forth by the various statutes in the Welfare and Institution Code. De facto parenthood is a more informal status that came into being as a result of judicial intervention, i.e., a need to recognize people who, like the grandmother, fall outside the statutory child welfare system but have an interest in a minor's well-being that arises out of having cared for the minor from day to day over a substantial period of time. (*In re R. J.* (2008) 164 Cal.App.4th 219, 223; see Cal. Rules of Court, rule 5.502(10).) The status of de facto parent is more than merely titular. " 'The interest of the "de facto parent" is a substantial one . . . .' " (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 952,

fn. 9.) " 'The de facto parenthood doctrine . . . recognizes that persons who have provided a child with daily parental concern, affection, and care over substantial time may develop legitimate interests and perspectives, and may also present a custodial alternative, which should not be ignored in a juvenile dependency proceeding.' " (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 444, fn. 25.) Accordingly, the de facto parent enjoys certain rights. (Cal. Rules of Court, rules 5.530(a), (b)(2), (b)(3), 5.534(e); see *In re Vincent M*., at p. 953; *In re R .J*., at pp. 223-225.) Those rights, are, however, limited (see *In re Kieshia E*. (1993) 6 Cal.4th 68, 75-79); a de facto parent is "an outsider to the parent-child relationship." (*Id*. at p. 77.) Of note here, a de facto parent has no right to visitation. (*In re P. L.* (2005) 134 Cal.App.4th 1357, 1361.)[2]

With regard to a de facto parent's right to counsel, the California Rules of Court give a negative initial answer, but not a final one, to the grandmother's claim that she was entitled to the assistance of counsel when the juvenile court was adjudicating the frequency of her visits with S. H.[3] Rule 5.534(e) of the California Rules of Court provides that a "de facto parent may: [¶] (1) Be present at the hearing; [¶] (2) Be represented by retained counsel or, at the discretion of the court, by appointed counsel; and [¶] (3) Present evidence." The court also has discretion generally to permit de facto

---

[2] *In re P. L.*, *supra*, 134 Cal.App.4th 1357, reached this conclusion by relying on Justice Kennard's dissenting opinion in *In re Kieshia E.*, *supra*, 6 Cal.4th at page 82, but overlooked the fact that it was her lone dissenting opinion that stated "de facto parent status does *not* entitle a psychological parent to custody of the child, to visitation with the child, or to any degree of independent control over the child's destiny whatsoever." (*Ibid.* (dis. opn. of Kennard, J.).) The principle appears sound, however, and we have no reason to question it despite its provenance.

[3] In her reply brief, the grandmother states that "[t]he argument is not that appellant was denied the right to counsel, it is that she was denied due process by the court's arbitrary and mistaken relief of counsel already provided, and by the fundamental unfairness of the [resulting] proceedings . . . ." In our view, however, the grandmother also claims deprivation of a right to the assistance of counsel in the first instance.

parents to "participate as parties in disposition hearings and any hearing thereafter at which the status of the dependent child is at issue." (*Ibid.*) Thus, there is no obligation under state law for a juvenile court to expend state funds to appoint counsel for a de facto parent who cannot afford to retain counsel privately. (*In re Joel H*. (1993) 19 Cal.App.4th 1185, 1197-1199.)

II. *Claim That the Juvenile Court Was Forgetful and Acted Unfairly*

The grandmother claims that regardless of the scope of the right to counsel in principle, the combination of the juvenile court's forgetfulness that it had appointed counsel for her as a de facto parent, its assertedly "arbitrary and mistaken" removal of counsel at the April 21, 2009 hearing, and counsel's failures to (1) remind the court at the April 7, 2009 hearing, that in December of 2008 the court had appointed counsel for the grandmother as a de facto parent and (2) argue for continued representation at the April 21, 2009 hearing, deprived her of her right to a fundamentally fair proceeding under due process principles, evidently as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and to the effective assistance of counsel.

"It is axiomatic that due process guarantees apply to dependency proceedings." (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 756.) Moreover, it has been held that due process may give a de facto parent rights beyond those set forth in the California Rules of Court. (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851; see also *In re Vincent M., supra*, 161 Cal.App.4th at p. 953.)

The record suggests that at the April 7, 2009 hearing the juvenile court did not recall that it had appointed Kevin Thurber as counsel for the grandmother in her capacity as a de facto parent in December of 2008. The court thought that it had not appointed counsel, but in fact it had. Counsel did not attempt to remind the court that it did appoint counsel for the grandmother in December of 2008.

Significant for purposes of this appeal, however, the juvenile court showed no inclination to exercise its discretion in favor of appointing counsel for the grandmother.

It was definite in expressing its view that the grandmother was no longer entitled to court-appointed counsel. There is no reason to believe it would have wanted to continue to provide counsel for the grandmother even if it had recalled the circumstances of December of 2008 accurately or if counsel had reminded the court about those circumstances. We see nothing arbitrary in that posture—the court seemed to feel that the case would not benefit further by continuing to provide the grandmother with counsel and the record does not suggest that such a view would be arbitrary, capricious, or such as to work a fundamental unfairness. The grandmother's due process claim is unavailing.

III. *Grandmother's Right to Appear at the April 21, 2009 Hearing*

As for the grandmother's claim that she had the right to appear on her own behalf at the April 21, 2009 hearing in question, no one denied her that right. She appeared at the April 7, 2009, and May 28, 2009 hearings and failed to appear at the April 21, 2009 hearing even though the juvenile court alerted her to the April 21 date. Some of the reasons the grandmother offers for failing to appear, to be sure, assertedly were the fault of other people, but that does not alter the fact that nothing in the record shows that she was prevented from attending the April 21 hearing. The claim is without merit.

CONCLUSION

The juvenile court's order is affirmed.

_____
Duffy, J.

WE CONCUR:

_____
Rushing, P. J.

_____
Premo, J.